trade, ought to bear his share of the loss," and was therefore liable to third persons as a partner, enjoyed a considerable vogue both in England and in the United States.[3] In England it was finally overthrown in 1860 by the House of Lords in the case of Cox v. Hickman;[4] and it has been repudiated by most of the later cases in this country.[5] It is based on the theory that "if any one takes part of the profits, he takes a part of that fund on which the creditor of the trader relies for his payment;"[6] but this is essentially unsound, since net profits do not exist until creditors are paid.[7]

California has never adopted this "net profit doctrine" of Grace v. Smith. The sharing of profits is only one element to be considered in determining whether there is an actual partnership; and even more important are the questions whether the losses are also shared and whether each of the associates is given the power of joining in the control of the business and of binding the others as their agent.[8] Therefore a person is not liable as a partner because of his right to share in the profits, when the share is merely his compensation under a contract of employment,[9] or where it is his rental under a contract of hiring.[10] The same considerations apply where, as in the principal case, money is advanced to be repaid out of the profits of the business; if there is no right of control on the part of the person advancing it, and no "joint venture," the transaction is a loan, and not an investment; and in the absence of some element of estoppel, the lender is not liable for the debts of the business.

M. E. H.

Possession; Right of Prior Possessor as Property.—If we understand correctly the case of Bond v. Aickley, decided by the District Court of Appeal for the Third Appellate District of California, it reaches a result which does violence to fundamental notions of the utmost importance with respect to the title to land. The plaintiff sued the defendant, who was in possession, in the usual statutory form, commonly called the action to quiet title. She attempted to prove title by adverse possession, in which, the court very properly holds, she signally failed to show either a continuous actual possession or the

---

[3] Hesketh v. Blanchard, (1893), 4 East 144; Cheap v. Cramond, (1821), 4 B. & Ald. 663; Parker v. Canfield, (1870), 37 Conn. 250; Winship v. United States Bank, (1831), 5 Pet. 529, 8 L. ed. 216.

[4] 8 House of Lords Cas. 268.

[5] See cases collected in note, 16 L. R. A. (n. s.) 963.

[6] Grace v. Smith, supra.

[7] Eastman v. Clark, (1873), 53 N. H. 276, 16 Am. Rep. 192.

[8] Coward v. Clanton, 122 Cal. 451; Title Insurance & Trust Co. v. Grider, 152 Cal. 746.

[9] Robinson v. Haas, 40 Cal. 474; Stone v. Bancroft, 112 Cal. 652.

[10] Smith v. Schultz, 89 Cal. 526.

[1] 16 Cal. App. Dec. 840 (May 6, 1913).

statutory condition of the payment of taxes. She did, however, show that her grantor had at one time been in actual possession, and the defendants did not undertake to show either a title or a prior possession. In holding that the plaintiff should lose, because she failed to show a complete title by adverse possession, did not the court overlook the basic principle upon which our whole system of title rests,—that "as against a wrongdoer, possession is title?"[2] Mr. Justice Angellotti expresses the proposition, in a recent case, as follows: "As against an entire stranger to the title, actual possession of land has uniformly been held, both in ejectment and actions to quiet title, to make out a prima facie case sufficient to sustain a claim of ownership."[3] One of the greatest of American jurists rests the protection which the law affords to the prior possessor upon the instinct which man shares with the dog or seal, not to allow himself to be dispossessed of what he holds without trying to get it back again.[4] It is, perhaps, not indispensable to find the psychological grounds upon which the principle is based; it is sufficient to recognize it as the necessary postulate upon which all legal systems must found themselves. Society, without the protection of the first possessor, is simply unthinkable.

The prior possession of plaintiff's grantor in the principal case sufficiently established his title as against the defendant, a later possessor, and the title, thus established, passed to plaintiff by the deed from her grantor. In discussing the question of prescription or adverse possession, it is respectfully submitted that the Court was dealing with an immaterial issue. O. K. M.

Waters: Nature of Property in Water.—Copeland v. The Fairview Land & Water Company,[1] a case recently decided by the Supreme Court, contains the following statement: "Water, in its natural state, is a part of the land. Like any other part thereof, it may become personal property by being severed from the realty, but not until then." The legislature of California by an amendment to the Civil Code adopted in 1911 has declared that "All water or the use of water within the State of California is the property of the people of the State of California."[2] This latter statement can not, of course, be urged to have controlling effect upon the former. Being but a declaration by the legis-

---

[2] Lord Campbell, C. J., in Jeffries v. Great Western Railway Co. (1856) 5 E. & B. 802, 805.

[3] Davis v. Crump, (1912) 162 Cal. 513, 518, 123 Pac. 294.

[4] Holmes; The Common Law, p. 213.

[1] Decided Mar. 20, 1913, 45 Cal. Dec. 398.

[2] Civil Code of California sec. 1410; Statutes and Amendments of 1911, p. 421.